IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 358

DAVID L. SUBIN,

Petitioner,

against

A. PHILIP GOLDSMITH, ABRAHAM FEINBERG, BENJAMIN HINERFELD, F. STAFFORD CLEARY, J. A. C. MUELLER, T. H. MUELLER, J. J. MURPHY, WILLIAM B. TERRY, G. H. CARR and JULIUS KAYSER & Co., a New York corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 165-168, PA 40-P42)* is not officially reported. The opinion of the United States Court of Appeals is not yet reported. It is reprinted as an appendix to the Petition, pp. 14-56.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Statute and Regulation Involved

The pertinent provisions of the Securities Exchange Act of 1934 (Title 15 U. S. C. §78n (a) ("The Act") and the

---

* "PA" references refer to pages in document marked "Appendix of Plaintiff-Appellant".

regulation involved (Rule X-14A-9 of the Securities and Exchange Commission ("The Commission")) are set forth in the petition at page 3.

Question Presented

Was the alleged omission from the July 22, 1954 Proxy Statement of individual motives and of reference to the evidentiary fact that moneys paid by Kayser for the assets of Diamond would be used to liquidate certain personal obligations incurred by the purchase of Kayser stock a sufficient allegation of fact to state a claim for violation of Section 14(a) of the Act and, more particularly, Rule X-14A-9, even though the ultimate facts of conflicting self-interests were specifically delineated in said Proxy Statement.

Statement

A complete statement of the case and previous proceedings heretofore had is contained in the respondents' cross-petition for a writ of certiorari, docket number 362, October Term 1955, at pages 2 through 5.

The review sought by the petitioner herein is limited to the sufficiency of the allegations contained in Counts I and III of the amended complaint (PA 4-15); in particular, with respect to the statement of a claim under Rule X-14A-9 of the Securities and Exchange Commission and Section 14(a) of the Securities and Exchange Act of 1934 (petition, p. 1).

It is the petitioner's contention that the statements contained in the Proxy Statement **(D2a-D44a), to wit, all interests of the directors and officers had been disclosed (D12a), were false and misleading by virtue of the fact that the Proxy Statement failed to disclose that the proceeds of the sale of Diamond Hosiery Corp. ("Diamond")

** "D-a" references refer to pages in document marked "Appendix to Appellees' Brief".

would be used to pay certain obligations incurred by A. Philip Goldsmith ("Goldsmith") Abraham Feinberg ("Feinberg") and Benjamin Hinerfeld ("Hinerfeld") (petition, pp. 8-9). These obligations were allegedly incurred prior to the acquisition of the assets of Diamond by Julius Kayser & Co. ("Kayser") and any stock interest in Kayser by Goldsmith, Feinberg or Hinerfeld. It is not alleged that Kayser was a party to these loans or in any way affected or obligated by virtue thereof (PA 9-10). Similarly, it is contended that the omission of any mention of these loans and the disposition of the proceeds was an omission of a material fact, which, in light of the existing circumstances, was necessary to make the representations in the Proxy Statement "not false or misleading" under Rule X-14A-9 (petition, pp. 8-9).

Since the petitioner in his petition relies almost exclusively upon the omission of reference to these alleged loans, this being the only factor of substance found by Judge FRANK in his dissent below (petition, p. 43), it is assumed that all other grounds and supposed deficiencies stated in the amended complaint have been abandoned.

A copy of the Proxy Statement was appended to the amended complaint (PA 18-33), incorporated within the pleading by reference (PA 6, 7, 8, 9), and before the Court on the respondents' motion to dismiss under Rule 12(b)(6) F. R. C. P. for failure to state a claim. The majority in the Court below (petition, pp. 45-52) and the District Court (PA 40-42) found, in essence, that the omission of reference to whether or not the persons purchasing shares of Kayser stock borrowed some monies to finance part of the purchase, when read in light of the other facts pleaded by the petition (i.e., description of interests of the directors and officers) and contained in the annexed Proxy Statement was not actionable at law.

In short, the question determined by the Court below and presented by the petitioner is: Whether the failure to set

forth certain facts, from which a personal motive of less than a majority of the directors might be gleaned and having no direct relationship to the transaction involving the stockholders or the Corporation, states a claim for relief under Rule X-14A-9.

ARGUMENT

I

The decision below is correct.

(a) Counts I and III were properly dismissed for failure to state a claim (re: Question 1).

It is undisputed that the Proxy Statement disclosed that Goldsmith, Feinberg and Hinerfeld beneficially acquired 31.2% of the capital stock of Kayser on May 13, 1954; that Goldsmith was a director of Kayser and effectively controlled Diamond, the company to be acquired; that Diamond had entered into a lease as lessee with a corporation controlled by Feinberg and Hinerfeld, who were similarly officers and directors of Kayser; and, that this lease was to be assumed by Kayser (D12a-D13a). The net effect of this transaction, as characterized by the District Court, was "* * * a defensible merger of an old established firm with a rapidly expanding new one." (PA 42).

If it be assumed, *arguendo*, as petitioner assumed though he did not so allege,[1] that certain loans were made by Gold-

1. "Said proxy statement omitted to state material facts necessary in order to make the statements therein at pages 2-6 thereof * * * not false or misleading; among other things, said proxy statement omitted to state (or set forth): (i) The amount of money borrowed by Diamond, Hillcrest and Hamilton Textile to purchase the stock of Kayser, as aforesaid; the date or dates on which said corporations were required to repay such loans; and the portion of the purchase price to be paid by defendant Kayser to Diamond which will be used by Diamond, Hillcrest or Hamilton Textile respectively to repay such loans made by them for the purpose of acquiring the stock of defendant Kayser."

smith, Feinberg and Hinerfeld to acquire their beneficial stock interest in Kayser, the omission of reference thereto did not render the Proxy Statement defective under Section 14(a) of the Act or Rule X-14A-9 of the Commission's Regulations. The Proxy Statement disclosed by clear inference the ultimate fact that all proceeds would enure to the sole benefit and unfettered use of the individuals whose conflicting self-interests had previously been disclosed. The petitioner contends that the failure to particularize the specific use of the proceeds (i.e., liquidation of implied private loans incurred by the purchase of Kayser stock), which at best would be mere evidence of the already disclosed ultimate fact of self-interest, was the omission of a material fact rendering the Proxy Statement false or misleading (petition, pp. 8-9).

A statement of motive was not required under the existing law of *Doyle* v. *Milton*, 73 F. Supp. 281, 286 (D. C. S. D. N. Y., 1947), and not required by the staff of the Commission during their informal, but exhaustive, examination and analysis of the submitted and distributed Proxy Statement. What disposition was made of these funds, whether used to pay an obligation incurred to purchase Kayser stock; or used to pay any other obligation; or used to donate to a worthy charity is of no importance to the stockholders or the corporation itself. Any such disclosure of motive or a specific use or uses of the proceeds over which Kayser no longer had any interest or control would at best be the disclosure of an evidentiary fact from which the ultimate fact of self-interest "might reasonably" be inferred. Herein lies the weakness of the petitioner's position—for it is undenied that the stockholders were adequately forewarned by full disclosure in the Proxy Statement of the existence of the ultimate fact of conflicting self-interest. As long as this duality of interests was disclosed; the stockholders fairly acquainted with the terms of the proposed transaction; and, the transaction was for full and adequate consid-

eration and beneficial to Kayser, the disposition of the proceeds is utterly without significance—for neither the Corporation nor the stockholders were parties thereto or affected in any manner thereby.[2]

To require as a matter of law that proxy statements in addition to the ultimate fact of self-interest must disclose all motivations of the directors which might enter into a proposed transaction is to cast an insufferable burden upon the Commission, without the scope and intent of the Act. The petitioner argues for a rule of law which would require the Commission in every proxy and registration solicitation to conduct exhaustive investigation into the private affairs of all corporate officials in quest of some hidden motive which should stand the scrutiny and light of public disclosure. The Commission has never required such disclosure (see *Doyle* v. *Milton, infra*). For the courts to superimpose such an *ad hoc* legislative requirement upon the Commission, without unequivocal statutory language or affirmative administrative request, would seriously delay and hamper the effective administration of the Act. Determining motivation is at best a tenuous, psychologically calculated guess based upon extensive examination and analytical evaluation of the various economic, social or political factors impinging upon the individual at the specific time of action. To require the Commission analytically to sift these innumerable factors and require affirmative delineation of any and all motives moving the individual would appear to be presumptive, economically unsound, administratively burdensome and without the scope and intent of both the Act and the Commission's Rules.

The District Court, in *Doyle* v. *Milton,* 73 F. Supp. 281, 286 (D. C. S. D. N. Y., 1947), in considering whether the

---

2. Cf. *Dunn* v. *Decca Records,* 120 F. Supp. 1, 2 (D. C. S. D. N. Y., 1954); *Doyle* v. *Milton,* 73 F. Supp. 281, 286 (D. C. S. D. N. Y., 1947).

omission of an alleged hidden motive of the defendants to perpetuate control of the management of the Corporation and thereby further their own personal interests to the detriment of the plaintiff and all other stockholders constituted a defect in the Proxy Statement under Section 14(a) of the Act and Regulation X-14, held that a Proxy Statement is not rendered false or misleading by the omission of selfish motives.

Judge RIFKIND, in dismissing such allegations of motive as insufficient in law, said (p. 286):

> "The statute, §14(a) of the Securities Exchange Act of 1934, confides in the Securities and Exchange Commission very broad rule making powers with respect to proxy solicitation. The Commission has promulgated such a regulation, X-14. That regulation does not in terms require the inclusion of statements as to motive.
> * * *
>
> "The upshot of these reflections is that a court ought not to rush in where the experts fear to tread. At any rate I think it more prudent not to anticipate the Commission's determination that the proposed course is both feasible and in the public interest. Until the Commission speaks my answer to the second question (inclusion of motive within a Proxy Statement) is No." (parenthetical language supplied)[3]

(b) The Court could determine that the Proxy Statement was not false or misleading, upon the facts alleged in the amended complaint, as a matter of law (re: Question 2).

By Question 2 the petitioner raises the point whether a complaint alleging fraud by omission, along with other fac-

3. Also see: *Textron, Inc.* v. *American Woolen Co.*, 122 F. Supp. 305, 310 (D. C. Mass., 1954), where failure to disclose alleged wrongful intent was not considered an omission rendering the Proxy Statement false or misleading under Rule X-14A-9.

tors indicating the surrounding circumstances, can be dismissed as a matter of law for failure to state a claim under Rule 12(b)(6) F. R. C. P. It is the petitioner's contention that the Court below erred in dismissing Counts I and III as a matter of law. Petitioner's reasoning is as follows: (a) it was alleged that certain facts were omitted; (b) that these omissions were the omissions of material facts necessary not to make the Proxy Statement false or misleading; (c) upon a motion to dismiss it must be assumed that these allegations were true; (d) therefore, a claim under Rule 8(a) was stated; (e) and, this claim survives a motion to dismiss under Rule 12(b)(6).

The fallacy of the petitioner's reasoning is twofold. Initially, he errs in the assumption that pleaded conclusions of law and his characterization of the Proxy Statement stand admitted. The allegations that the omissions were material and that the inclusion of these omissions was necessary to make the Proxy Statement not false and misleading under Rule X-14A-9 (the alleged conclusions of law and deductions of fact) are not admitted for the purposes of a motion to dismiss.[4] Similarly, the petitioner fails to recognize that the entire Proxy Statement, appended to the amended complaint and incorporated by reference into the pleading as Exhibit A, was before the Court on the respondents' motion under Rule 12(b)(6). Reference by the Court to this Statement was not the reference to extraneous matter without the borders of the pleading—but reference to the pleading itself. *St. Louis, K. & S. E. R. Co.* v. *United States,* 267 U. S. 346, 45 S. Ct. 245, 69 L. Ed. 649 (1925).

The Court, in dismissing Counts I and III, and the Court below in affirming, were duty bound to look to the entire pleading and in its total light determine if these omissions

4. 2 Moore, Federal Practice (2d ed., 1953), ¶ 12.08, p. 2244, and cases cited.

could, under any facts proved by the petitioner, support a claim for relief under Rule X-14A-9 (i.e., could these omissions from the Proxy Statement reasonably be material facts necessary in order to make the Proxy Statement not false or misleading). The Court below did not decide adversely to the petitioner an issue of fact (i.e., whether the omissions were in fact material); but rather decided that the sum of the facts as pleaded were legally insufficient, in light of the other facts contained in the Proxy Statement and incorporated in the pleading by reference, to show that a legal wrong could have been committed.[5]

II

There is no important question of Federal law presented.

In effect, the petitioner is calling upon this Court to interpret and apply, to the particular factual situation presented, Rule X-14A-9, promulgated pursuant to Section 14(a) of the Act. Section 14(a) of the Act is a general delegatory provision allowing the Commission to establish the rule under which the petitioner alleges violation. Hence, the interpretation and question involved concerns a rule of the Commission and only indirectly the Act itself.[6]

In answer to the petitioner's contention that a substantial question of Federal law exists, it is respectfully submitted that though the Commission's own Rule is in issue, the petitioner neither sought redress through the Commis-

5. See *St. Louis, K. & S. E. R. Co.* v. *United States*, 267 U. S. 346, 45 S. Ct. 245, 69 L. Ed. 649 (1925); *Kordewick* v. *Brotherhood of Railroad Trainmen*, 181 F. 2d 963 (7 Cir., 1950); *Leggett* v. *Montgomery Ward & Co.*, 178 F. 2d 436 (10 Cir., 1949).

6. It is generally recognized that Congress by Section 14(a) of the Act left the solicitation of proxies to the Commission's discretion under broad "public interest" standards. See Loss, Securities Regulation (1951), pp. 523-524, and authorities cited therein.

sion nor has the Commission, though fully advised and informed by the *respondents* of all charges instituted and proceedings heretofore had, seen fit to intervene in any manner whatsoever. If the questions presented, as alleged by the petitioner, are of such a substantial nature as he would have this Court believe, it is difficult to imagine that the administrative agency which promulgated this Rule and, is (1) chargeable with the proper administration of its Rules and the Act; and, (2) is fully familiar with both the Proxy Statement as distributed and the charges made by the Petitioner, should stoically maintain a consistently indifferent attitude throughout the entire proceedings coursing through the District and Circuit Courts.[7] This contrasts markedly with the situation presented in other similar cases where, though the legal contest was between private litigants, the Commission considered the issues involved of sufficient importance to file briefs as *amicus curiae*.[8]

Though it is not contended that the lengthy and detailed conferences with the staff of the Commission with respect to the Proxy Statement has the force of a pre-judicial administrative determination,[9] surely this factor, when considered with the fact that the Commission was fully in-

7. Cf. *Securities and Exchange Commission* v. *O'Hara Re-election*, 28 F. Supp. 523 (D. C. Mass., 1939).

8. E.g., *Doyle* v. *Milton*, 73 F. Supp. 281 (D. C. S. D. N. Y., 1947).

9. But cf. *Dunn* v. *Decca Records, Inc.*, 120 F. Supp. 1, 2 (D. C. S. D. N. Y., 1954); *Peck* v. *Greyhound Corp.*, 97 F. Supp. 679 (D. C. S. D. N. Y., 1951). "Copies of proposed proxy material are required to be filed with the Commission in preliminary form at least 10 days prior to the date of the proposed solicitation. Where preliminary material fails to meet the disclosure standards, the management or other group responsible for its preparation is notified informally and given an opportunity to avoid such defects in the preparation of the definitive proxy material." (19th Annual Report of the Securities and Exchange Commission (1953), p. 33).

formed as to the extent and nature of the petitioner's charges, is *dehors* the contention that a substantial question of Federal law is now presented for this Court to determine.[10]

The weakness of the Petitioner's position is further evidenced by his reliance on *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953) as authority to show, by a parity of reasoning, that the instant case presents an important question at Federal law affecting the Act. The *Wilko* case, in which the Commission participated as *amicus curiae* throughout the entire proceedings, involved a fundamental interpretation of Sec. 14 of the Securities Act of 1933 (15 U. S. C., Sec. 77n), which declares void a waiver of any provision of the Securities Act of 1933 or the Commission's Regulations. It was contended that an arbitration clause in a margin agreement prevented the aggrieved purchaser from relying on the remedies of the Securities Act of 1933. A determination of whether the provisions of the Securities Act of 1933 prohibiting any waiver could be circumvented by the inclusion of such an arbitration clause, thereby obviating the remedies of that Act, was basic to the future existence of Sec. 14 of the Securities Act of 1933. To allow such indirect avoidance of these provisions would effectively sterilize and render nugatory the provisions forbidding a waiver.

Contrasting the fundamental problem of interpretation in the *Wilko* case with the instant situation, it cannot be contended that Rule X-14A-9 has been decimated and rendered ineffectual in future proxy solicitations. The prohibition of false or misleading statements remains, *proprio vigore*, as

10. It is safe to assume that if the Commission considered petitioner's charges substantial and producing violations of its own Rule X-14A-9, some formal administrative action to correct the supposed deficiency would have been instituted (i.e., request Kayser to issue a supplemental Proxy Statement and postpone the scheduled meeting).

before, to be applied to every pending and future fact pattern presented in a proxy statement. The determination by the Court below, that no violation of Rule X-14A-9 was stated by this petitioner does not and will not assist in determining the existence of a false or misleading statement in any other situation. For, whether a set of facts contained in a complaint, incorporating therein a proxy statement, states a claim for relief, or is violative of Rule X-14A-9, depends upon the particular circumstances presented.

III

There is no existing conflict of decision among the lower courts. The decision below does not affect any substantial amount of future litigation.

(a) There is no existing conflict.

The lack of importance of the case *sub judice* is highlighted by the complete failure of the petitioner to cite any authority even remotely connected with the question herein presented. There are no existing conflicts among the several Courts of Appeals; or, in fact, among their constituent District Courts.

(b) The decision below does not affect any substantial amount of pending or future litigation.

It is not contended, nor indeed can the petitioner contend, that the decision by the Court below affects any substantial amount of pending or future litigation. True, the petitioner resorts to the familiar and spurious argument of "horribles" and contends that the principles of *Pepper* v. *Litton*, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939) have been emasculated by the decision below (petition, p. 11).[11] But the fact remains that the petitioner cannot point to any pending or past administrative action or litigation

11. "* * * But the court below has adopted such a narrow standard as to vitiate the doctrine announced in Pepper v. Litton, 308 U. S. 295 and to render the proxy rules useless as an instrument for protecting stockholders. * * *"

even remotely connected with the issues he now seeks to have this Court review. Similarly, it is not seriously urged by the petitioner that the decision below affects the orderly administration of the Act involved or is contrary to any established policy of Congress or the Commission itself.

A determination by this Court will not affect any other litigants in any other comparable litigation now pending or to be instituted. The petitioner has proceeded under Rule X-14A-9, which is the general "catch-all" provision prohibiting false or misleading statements, having its genesis in common law fraud and deceit. Under Rule X-14A-9, and an essential element to establish common law fraud, it is necessary to show materiality of the alleged omission, in light of the particular circumstances pleaded. Any determination by this Court must be predicated strictly upon the specific Proxy Statement involved and pleaded in the complaint. A simple reference to the existing case law decided under Rule X-14A-9 indicates that any determination as to the materiality and sufficiency of the facts pleaded to constitute a claim for relief is *sui generis*.[12]

---

12. See *Textron, Inc.* v. *American Woolen Co.*, 122 F. Supp. 305, 310 (D. C., Mass., 1954) (failure to disclose alleged wrongful intent did not make the Proxy Statement false or misleading); *Dunn* v. *Decca Records*, 120 F. Supp. 1, 2 (D. C. S. D. N. Y., 1954) (failure to disclose additional pecuniary remuneration to the president did not render the Proxy Statement false or misleading); *Kerbs* v. *California Eastern Airways*, 94 A. 2d 217, 219 (Del. Ch., 1953) (failure to inform stockholders of lack of quorum under state law because of existing self-interests of the directors was not an omission rendering the Proxy Statement false or misleading); *Kaufman* v. *Shoenberg*, 91 A. 2d 786 (Del. Ch., 1952) (failure to refer to existing incentive compensation for key employees who were to receive further incentive benefits by the proposed plan for which the proxies were solicited was not an omission of a material fact); *Eliasberg* v. *Standard Oil Co.*, 23 N. J. Super. 431, 444, 92 A. 2d 862, 868, 869 (1952), aff'd 12 N. J. 467, 97 A. 2d 437 (failure to disclose inherent tax benefits to officers and directors and correlative tax disadvantages to corporation under proposed stock option plan was not a material omission).

Hence, instead of deciding a question of great and pressing importance in the affairs of the nation tending to promote the consistent and orderly administration of justice throughout the country, a determination by this Court would merely determine whether the omissions of certain loan data from which a motive "might" possibly be inferred from the July 22, 1954 Proxy Statement of Julius Kayser & Co. was the omission of a material statement necessary to make that specific Proxy Statement "not false or misleading"; and whether the statement that the interests of the directors were fully disclosed was false or misleading. No amount of strained semantics can enlarge the scope of the real questions now presented. The Commission, which informally examined the Proxy Statement prior to distribution and has been fully apprised of the petitioner's allegations has not seen fit to take any action. In addition thereto, two Courts have considered the problems and found that the petitioner failed to state a claim. Only one, out of a total of four judges who have considered this question at length in the two lower Courts, found merit to the petitioner's claim under Count III. There was complete unanimity in dismissing Count I. The petitioner, not yet convinced, now seeks to obtain review here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

SAMUEL M. CHAPIN
ALVIN MCKINLEY SYLVESTER
SAMUEL GOTTLIEB
Counsel for Respondents

September 23, 1955.

FILED
AUG 30 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 362

A. PHILIP GOLDSMITH, ABRAHAM FEINBERG, BENJAMIN HINERFELD, F. STAFFORD CLEARY, J. A. C. MUELLER, T. H. MUELLER, J. J. MURPHY, WILLIAM B. TERRY, G. H. CARR and JULIUS KAYSER & CO., a New York corporation,

Cross-Petitioners,

against

DAVID L. SUBIN,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, WITH APPENDIX

SAMUEL M. CHAPIN,
ALVIN MCKINLEY SYLVESTER,
285 Madison Avenue,
New York, N. Y.

SAMUEL GOTTLIEB,
122 East 42nd Street,
New York, N. Y.

Counsel for Cross-Petitioners, Julius Kayser & Co., et als.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050 110

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	14
Appendix (Rule 56, Federal Rules of Civil Procedure)	1a

Cases Cited

Arnstein v. Porter, 154 F. 2d 464 (2 Cir., 1946) 12

Bishop v. Shaughnessy, 119 F. Supp. 62 (D. C. N. D. N. Y., 1950) 7

Bozant v. Bank of New York, 156 F. 2d 787 (2 Cir., 1946) 9

Brensinger v. Margaret Ann Super Markets, 192 F. 2d 458 (5 Cir., 1951) 7, 10

Brooks v. Utah Power & Light Co., 151 F. 2d 514 (10 Cir., 1945) 6, 9, 14

Byrnes v. Mutual Life Ins. Co. of N. Y., 217 F. 2d 497 (9 Cir., 1954), cert. den. 348 U. S. 971, 75 S. Ct. 532 (1955) 8

Chesapeake & Ohio Ry. Co. v. Mark, 283 U. S. 209, 51 S. Ct. 453 (1931) 11

Cohen v. Beneficial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221 (1949) 13

Colby v. Klune, 178 F. 2d 872 (2 Cir., 1949) 9, 12

Compania De Remorque y Salvamento v. Esperance, 187 F. 2d 114 (2 Cir., 1951) 11, 12

Crosby v. Oliver Corp., 9 F. R. D. 110 (D. C. Ohio, 1949) 10

PAGE

Dewey v. Clark, 86 U. S. App. D. C. 216, 180 F. 2d 766 (D. C. Cir., 1950) 11

Dickheiser v. Penn. R.R. Co., 5 F. R. D. 5 (D. C. Pa., 1945), aff'd 155 F. 2d 266 (3 Cir., 1946), cert. den. 329 U. S. 808, 67 S. Ct. 620 (1947) 6, 9

Dyer v. MacDougall, 12 F. R. D. 357 (D. C. E. D. N. Y., 1951), aff'd 201 F. 2d 265 (2 Cir., 1952) 8, 13

Engl v. Aetna Life Ins. Co., 139 F. 2d 469 (2 Cir., 1943) 12

Fogelson v. American Woolen Co., 170 F. 2d 660 (2 Cir., 1948) 8, 9, 12

Geller v. Transamerica Corp., 53 F. Supp. 625 (D. C. Del., 1943), aff'd 151 F. 2d 534 (3 Cir., 1945) 7

Gifford v. Travelers Protective Assn. of America, 153 F. 2d 209 (9 Cir., 1946) 8

Kuykendall v. United Gas Pipe Line Co., 208 F. 2d 921 (5 Cir., 1953) 11

Lindsey v. Leavy, 149 F. 2d 899 (9 Cir., 1945), cert. den. 326 U. S. 783, 66 S. Ct. 331 (1946) 7, 13

Lopata v. Handler, 37 F. Supp. 871 (D. C. Okla., 1941), app. dsmd. 121 F. 2d 938 (10 Cir., 1941) 6, 9

Marion County Cooperative Assn. v. Carnation Co., 214 F. 2d 557 (8 Cir., 1954) 8

Orvis v. Brickman, 95 F. Supp. 605 (D. C. D. C., 1951), affd. 90 App. D. C. 266, 196 F. 2d 762 (D. C. Cir., 1952) 8, 10

Radio City Music Hall v. United States, 135 F. 2d 715 (2 Cir., 1943) 12

Richard v. Credit Suisse, 242 N. Y. 346, 152 N. E. 110 (1926) 7, 8

Sabin v. Home Owners' Loan Corp., 151 F. 2d 541 (10 Cir., 1945) 7

Schreffler v. Bowles, 153 F. 2d 1 (10 Cir., 1946), cert. den. 328 U. S. 870, 66 S. Ct. 1366 (1946) 7

PAGE

Shielcrawt v. Moffett, 294 N. Y. 180, 62 N. E. 2d 392 (1945) 13

Surkin v. Charteris, 197 F. 2d 77 (5 Cir., 1952) 8, 10, 11

Wilkinson v. Powell, 149 F. 2d 335 (5 Cir., 1945) 7

William J. Kelly Co. v. R. F. C., 172 F. 2d 865 (1 Cir., 1949) 13

Wise v. Universal Corp., 93 F. Supp. 393 (D. C. Del., 1950) 6, 7, 9, 10

Statutes Cited

28 U. S. C. §1254(1) 2

New York General Corporation Law, Section 61-b 13

Trial Term Rule XI, Subd. 6, N. Y. Supreme Court, Appellate Division, First Department 13, 14

Federal Rules of Civil Procedure

Rule 8(a) 13

Rule 12(b)(6) 5, 9, 13

Rule 23(b) 10, 13

Rule 56 .....2, 5, 7, 9, 10, 12, 13

Rule 56(e) 6, 8, 9

Miscellaneous

6 MOORE, FEDERAL PRACTICE (2d ed., 1953):

¶ 56.04(1), pp. 2028, et seq. 8
¶ 56.15(1), pp. 2106, et seq. 12
¶ 56.15(4), p. 2142 8

ASBILL & SNELL, *Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented*, 51 Mich. L. Rev. 1143, 1151-1152 (1953) 12

The Scope of Summary Judgment Under the Federal Rules, 5 Vand. L. Rev. 607, 611-612 (1952) 12

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No.

A. PHILIP GOLDSMITH, ABRAHAM FEINBERG, BENJAMIN HINERFELD, F. STAFFORD CLEARY, J. A. C. MUELLER, T. H. MUELLER, J. J. MURPHY, WILLIAM B. TERRY, G. H. CARR and JULIUS KAYSER & Co., a New York corporation,

Cross-Petitioners,

against

DAVID L. SUBIN,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 3, 1955 reversing and remanding in part the decision of the District Court, with respect to Count V of the amended complaint.

Opinions Below

The opinion of the District Court (*R. 165-168, †P40 to P42) is not officially reported. The opinion of the United States Court of Appeals is not yet reported. It is reprinted as an Appendix to the original petition of Subin, respondent herein, pp. 14-56.

---

* All "R" references refer to pages of the Record.

† All "P" references refer to pages of Plaintiff-Appellant's Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on June 3, 1955 and is reprinted at pp. 57-58 in the original petition of Subin, respondent herein. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Question Presented

Where plaintiff in a derivative stockholders' action submits no affidavit in opposition to the defendants' motion for summary judgment, either to substantiate the allegations of fraud made upon information and belief, or to challenge the facts of the movants' affidavit, negating and completely controverting all allegations of fraud, must summary judgment nevertheless be denied and the defendants compelled to proceed to trial on the sole basis of the plaintiff's claimed right to cross examine as to credibility and demeanor of the unchallenged affiant.

Statute Involved

The pertinent statutory provisions of Rule 56, Federal Rules of Civil Procedure are set forth in the Appendix, *infra,* p. 1a.

Statement

On July 22, 1954 Julius Kayser & Co., one of the petitioners herein (hereinafter referred to as "Kayser") entered into an agreement with Diamond Hosiery Corp. (hereinafter referred to as "Diamond"), subject to approval of the shareholders of Kayser (**D13a), by which it

---

** All "D—a" references refer to pages of Defendants-Appellees' Appendix.

acquired the profitable, functioning organization and business of Diamond, including manufacturing facilities, purchase orders, inventories and certain licenses and leases necessary for the operation of the Diamond property (D15a to D29a). The aggregate cash involved was approximately $1,725,000; the assumption of a ten year mortgage obligation totaling $389,500; and the duty to discharge certain contractual obligations incident to the assets, licenses and lease acquired (D17a to D19a). Diamond's valuable good will, trademarks and profitable licenses were acquired for the nominal sum of One Dollar (D5a, D18a). The inventory, which was completely current and against which there were purchase orders of at least $500,000, was purchased at the lower of cost or market (D4a, D18a). In addition, Kayser acquired the services of personnel who had made Diamond a unique and highly successful hosiery concern. Though Kayser has been in the hosiery business since 1890, during the past few years its volume has steadily declined. During the fiscal year ending June 30, 1954, its hosiery volume was approximately one-half that of Diamond (D10a). Conversely, Diamond had operated at an increased volume, rising from $1,400,000 in 1949 to $7,900,000 during the fiscal year ended February 28, 1954 (D8a). The products manufactured by Diamond are in a low price field and do not conflict with but complement the established lines of hosiery produced by Kayser, thus giving it a completely diversified line of products in all price fields (D10a).

A Notice of Meeting and Proxy Statement, to secure stockholder approval as provided in the agreement, was issued to all shareholders of July 22, 1954 (D1a to D44a), and disclosed that A. Philip Goldsmith, one of the petitioners (hereinafter referred to as "Goldsmith") owned or controlled 75% of the stock of Diamond, and was an officer and director of that corporation; a director of Kayser; and that Diamond was the beneficial owner of approximately 10.4% of the stock of Kayser. Similarly it

was reported that petitioners, Abraham Feinberg (hereinafter referred to as "Feinberg"), a director and Chairman of the Board of Kayser, and Benjamin Hinerfeld (hereinafter referred to as "Hinerfeld"), a director and Executive Vice President of Kayser, owned or controlled a majority of the stock of Hillcrest Factors, Inc. (hereinafter referred to as "Hillcrest") and Hamilton Textile Mills, Inc. (hereinafter referred to as "Hamilton"), respectively. These organizations each controlled, and it was so indicated in the Proxy Statement, 10.4% of the stock of Kayser. It was further disclosed that Hamilton, Feinberg and Hinerfeld were associated with the lessor under a certain existing lease subsequently assumed by Kayser and executed by Diamond, as lessee, in 1953. This lease antedated the date Diamond, Hamilton, and Hillcrest acquired any stock interest in Kayser, which was May 13, 1954 (D12a to D13a).

After inspection of the assets; favorable recommendation by a subcommittee of the Board of Directors, the latter consisting of 11 members; and a finding that the purchase would be highly beneficial to Kayser and its stockholders, the Diamond contract was approved by the directors of Kayser, subject to stockholders' ratification (D10a to D11a, D13a). Neither Goldsmith, Hinerfeld nor Feinberg voted at the Board meeting at which the Diamond acquisition was discussed and approved. The Board's action was therefore completely independent (D57a). Diamond's fixed assets were acquired at 25% below their depreciated book value and well below the independent appraisals fixed by an independent engineering firm specializing in hosiery plants (D11a). Copies of the evaluations were before the Board of Directors at the meeting at which they voted to approve the Diamond contract and were available for inspection by any interested shareholders of Kayser and the Proxy Statement so stated (D11a).

The respondent and cross-petitioner (hereinafter referred to as "plaintiff"), a competitor of Kayser, purchased his 100 shares of stock one week before the an-

nouncement of the purchase of Diamond by Kayser; but after he knew Goldsmith, Feinberg and Hinerfeld had acquired control of 31.2% of the stock of Kayser and had been elected to its Board of Directors (D59a). On August 6, 1954, the plaintiff's attorneys wrote Kayser requesting extended data (D62a to D63a), to which Kayser replied promptly. Plaintiff declined to avail himself of Kayser's proffer to supply him with pertinent data; nor did the plaintiff attempt to examine the independent appraiser's report and other materials available at the company's office (D48a to D49a). Instead, on August 13, 1954, several days before the special meeting of stockholders called to approve the Diamond purchase, he commenced suit by Order to Show Cause seeking a preliminary injunction to restrain the meeting and alleged fraud, waste and mismanagement. He also charged the Proxy Statement was violative of Sections 14 and 29 of the Securities and Exchange Act (R. 1-35). This application for a preliminary injunction was denied by Judge WALSH (D60a to D63a). At the meeting duly held on August 20, 1954, the Diamond contract was approved by approximately 92% of the shareholders (455,199 for—43,389 against) (D65a).

At the hearing on plaintiff's motion for a preliminary injunction, defendants made a cross-motion to dismiss the complaint under Rule 12(b)(6), Federal Rules of Civil Procedure (R. 69-70). Thereafter, and before determination of the cross-motion, plaintiff served an Amended Complaint (P4 to P36). Defendants then moved under Rules 12(b)(6) and 56, F.R.C.P., to dismiss the first four counts (violations of the Securities and Exchange Act) and for summary judgment as to the fifth count (traditional derivative shareholders' count) (D64a to D65a). The District Court granted this relief *in toto* (P40 to P43), whereupon plaintiff appealed to the United States Court of Appeals for the Second Circuit. The District Court's determination was affirmed as to Counts I, II, III, and IV, Judge FRANK dissenting in part; and reversed and remanded as to Count V, Judge MEDINA dissenting (Appendix to Subin petition, pp. 14-56).

Reasons for Granting the Writ

1. Initially, it is respectfully submitted, the holding in the case *sub judice* is expressly predicated upon the assumption that the uncontroverted and unchallenged affidavit submitted by the movants completely controverted the plaintiff's allegations of fraud, waste and mismanagement. It is therefore clear that this holding is not based upon any insufficiency of the moving papers. Judge FRANK, speaking for the majority, expressed this thought, as follows (Appendix to Subin petition, p. 19):

> "We shall assume, arguendo, that Feinberg's affidavit, if taken as true, completely controverted the allegations of Count V. But we have held that, in such a derivative stockholders' suit—especially as to facts peculiarly within the knowledge of the defendants—plaintiff is entitled to a trial at which he may cross-examine the defendants and at which the trial judge can observe their demeanor in order, thereby, to evaluate their credibility."

In essence the majority has held, in the instant case, that in a stockholders' action in which fraud is alleged the affidavits of the defendants are disregarded, even though they completely controvert the plaintiff's unsupported allegations of fraud, alleged in his complaint upon information and belief, and irrespective of plaintiff's failure to submit any affidavit sufficient under Rule 56(e). This decision of the court below is directly in conflict with the decisions of the Tenth Circuit Court of Appeals in *Brooks* v. *Utah Power & Light Co.*, 151 F. 2d 514 (10 Cir., 1945); *Lopata* v. *Handler*, 37 F. Supp. 871, 873 (D. C. Okla., 1941), *app. dsmd.* 121 F. 2d 938 (10 Cir., 1941); and The Third Circuit Court of Appeals in *Dickheiser* v. *Penn. R.R.*, 5 F.R.D. 5, 10 (D. C. Pa., 1945), *aff'd* 155 F. 2d 266 (3 Cir., 1946), *cert. den.* 329 U. S. 808, 67 S. Ct. 620 (1947); also see *Wise* v. *Universal Corp.*, 93 F. Supp.

393 (D. C. Del., 1950); where, in granting the defendant summary judgment in a derivative stockholders' action alleging fraud, it was declared to be the avowed purpose and function of Rule 56 to pierce the allegations of the pleadings and require the plaintiff to "condescend upon particulars". Similarly, this decision is in conflict with the principles enunciated in *Brensinger* v. *Margaret Ann Super Markets*, 192 F. 2d 458 (5 Cir., 1951) (fraud action); *Sabin* v. *Home Owners' Loan Corp.*, 151 F. 2d 541 (10 Cir., 1945) (fraud in part); *Lindsey* v. *Leavy*, 149 F. 2d 899 (9 Cir., 1945), *cert. den.* 326 U. S. 783, 66 S. Ct. 331 (1946) (conspiracy alleged); *Geller* v. *Transamerica Corp.*, 53 F. Supp. 625 (D. C. Del., 1943), *aff'd* 151 F. 2d 534 (3 Cir., 1945) (fraud alleged).

This conflict has been recognized and expressed by Judge BRENNAN, one of the judges composing the majority in the court below, in *Bishop* v. *Shaughnessy*, 119 F. Supp. 62, 65 (D. C. N. D. N. Y., 1950), as follows:

> "To attempt to reconcile these decisions would be to undertake an onerous task, and it is doubtful if the conclusion would serve the purpose of complete clarification. If clarification is needed, it should come from an appellate court."

The clear intent of Rule 56, of which this Court is the final arbiter among the several federal Courts of Appeals and their constituent District Courts, is to permit speedy and expeditious disposition of litigation where no substantial genuine issue of a material fact is presented. The mere raising of a formalized issue or a conclusory averment in a pleading does not raise a substantial, genuine issue of fact. Rule 56 permits the Court to pierce the formal allegation and grant summary relief when it appears from the uncontroverted facts set forth in the affidavits that no genuine issue of fact exists. *Schreffler* v. *Bowles*, 153 F. 2d 1, 3 (10 Cir., 1946), *cert. den.* 328 U. S. 870, 66 S. Ct. 1366 (1946); *Wilkinson* v. *Powell*, 149 F. 2d 335, 337 (5 Cir., 1945); *Richard* v. *Credit Suisse*, 242 N. Y. 346, 350,

152 N. E. 110 (1926), per CARDOZO, *J.*; also see 6 MOORE, FEDERAL PRACTICE (2d ed., 1953), ¶ 56.04(1), p. 2028, *et seq.* and cases cited.

Where a party moves for summary judgment under Rule 56, it is incumbent upon the movant to present by affidavit, deposition or other authorized media, a prima facie showing that he is entitled to the relief sought. After this initial burden has been shouldered by the movant it remains for the opposing party to adduce some evidentiary facts, sufficient under Rule 56(e), to controvert the movant's offer and establish the existence of a disputed material issue of fact. *Marion County Cooperative Assn.* v. *Carnation Co.*, 214 F. 2d 557, 561, 562 (8 Cir., 1954); *Gifford* v. *Travelers Protective Assn. of America*, 153 F. 2d 209 (9 Cir., 1946); *Surkin* v. *Charteris*, 197 F. 2d 77 (5 Cir., 1952).

The majority in the instant case, after accepting the fact that the movants' affidavit completely controverted the plaintiff's allegations, attempts to justify its position by the creation of an inferential issue of credibility based upon the movants' unchallenged affidavit (Appendix to Subin petition, p. 19). It is respectfully submitted that, though demeanor and credibility might constitute real evidence at a trial, it can scarcely exist *in vacuo*. It is incumbent upon the plaintiff to show some substantive evidentiary facts—any facts—in support; and put the movants' affiants' credibility in issue. The plaintiff herein has shown nothing to detract from the credibility of these affiants. See *Byrnes* v. *Mutual Life Ins. Co. of N. Y.*, 217 F. 2d 497, 501 (9 Cir., 1954), *cert. den.* 348 U. S. 971, 75 S. Ct. 532 (1955); *Dyer* v. *MacDougall*, 12 F.R.D. 357, 358 (D. C. E. D. N. Y., 1951), *aff'd* 201 F. 2d 265, 268, 269 (2 Cir., 1952); *Orvis* v. *Brickman*, 95 F. Supp. 605, 607 (D. C. D. C., 1951), *aff'd* 90 App. D. C. 266, 196 F. 2d 762 (D. C. Cir., 1952); 6 MOORE, *op. cit.* ¶ 56.15(4), at p. 2142.

It is respectfully submitted that in the cases cited by the Court, e.g. *Fogelson* v. *American Woolen Co.*, 170 F. 2d 660

(2 Cir., 1948); *Colby* v. *Klune*, 178 F. 2d 872 (2 Cir., 1949); *Bozant* v. *Bank of New York*, 156 F. 2d 787 (2 Cir., 1946) some proof and affidavits sufficient under Rule 56(e) were submitted by the opposing party to prevent the suffering of summary judgment. These opposing affidavits set forth evidentiary facts from which the inferential fact of credibility could be drawn. In the instant case there has been no submission of any evidentiary fact from which it might be inferred that the credibility of the movants' affiants is in issue.

If the majority's holding is sound, a feigned and formal allegation of fraud in a complaint is sufficient to prevent summary judgment. Rule 56 is thus converted into an *ad hoc* duplication of Rule 12; and, though no exception appears to be so made in the Federal Rules of Civil Procedure, is completely inoperative in this type of litigation. Such a holding is in clear conflict with *Brooks* v. *Utah Power & Light Co.*, 151 F. 2d 514, 516 (10 Cir., 1945); *Dickheiser* v. *Penn. R.R.*, 5 F.R.D. 5, 10 (D. C. Pa., 1945), *aff'd* 155 F. 2d 266 (3 Cir., 1946), *cert. den.* 329 U. S. 808, 67 S. Ct. 620 (1947); *Lopata* v. *Handler*, 37 F. Supp. 871, 873 (D. C. Okla., 1941), *app. dsmd.* 121 F. 2d 938 (10 Cir., 1941); *Wise* v. *Universal Corp.*, 93 F. Supp. 393 (D. C. Del., 1950); where summary judgment was granted though fraud, waste and mismanagement were alleged in a derivative shareholders' action.

2. The majority in the instant case further held that the failure of the plaintiff to submit any affidavit to controvert the movants' affidavits was not sufficient grounds to grant summary judgment when the facts were within the peculiar knowledge of the movants(Appendix to Subin petition, p. 27).

It is difficult to rationalize the reasoning of the Court in reaching such a conclusion. Assuming *arguendo* that the rule be different where a *plaintiff* has peculiar knowledge of all of the facts and circumstances relating to the issues

involved and moves for summary judgment against a factually devoid *defendant*, it is illogical to apply such a rule where the *defendant* moves for summary judgment. See: *Orvis* v. *Brickman*, 90 App. D. C. 266, 196 F. 2d 762 (D. C. Cir., 1952) (Summary Judgment for defendants in false imprisonment action on defendants' affidavits); *Surkin* v. *Charteris*, 197 F. 2d 77 (5th Cir., 1952) (Summary Judgment for defendant in negligence action on unopposed affidavits); *Brensinger* v. *Margaret Ann Super Markets*, 192 F. 2d 458 (5th Cir., 1951) (Summary Judgment for defendant in fraud action based on defendants' unopposed affidavits); *Wise* v. *Universal Corp.*, 93 F. Supp. 393 (D. C. Del., 1950) (Summary Judgment for defendants in stockholders' derivative action based on defendants' affidavits); *Crosby* v. *Oliver Corp.*, 9 F.R.D. 110, 112 (D. C. Ohio, 1949). It is to be expected, and especially is this true in a derivative shareholders' action, where the complaint must be verified under Rule 23(b), that the plaintiff have some reasons and grounds to allege fraud, waste and mismanagement, other than mere aromatic speculation. The plaintiff has alleged *upon knowledge and belief*, in Paragraph 28 of the Amended Complaint (P16):

> "* * * said purchase would constitute an improper and wasteful expenditure of its funds, would be detrimental and injurious to it, and would be solely for the benefit of defendants Goldsmith, Hinerfeld, Feinberg and Diamond, Hillcrest and Hamilton Textile * * *."

The defendants' motion for summary judgment is the proper method to require the plaintiff to expand upon these allegations and specify the particulars upon which he relies to sustain his cause. If the plaintiff is not required to particularize his reasons and facts upon which he bases these allegations of fraud, waste and mismanagement, Rule 56 fails to accomplish its purpose as the method used to pierce the formal allegations of the complaint.

The plaintiff herein, by his own intransigence, refused to gather and voluntarily denied himself any information with respect to the Diamond contract. There existed as he knew, certain independent appraisals relating to the assets to be acquired. This information was on file and available for inspection by the plaintiff and any other interested shareholder (D11a). Plaintiff refused, by his own inaction, to avail himself of this data. Similarly, when plaintiff first expressed his objections to the transaction, an offer was made by Kayser to provide him with any information he might require (D48a to D49a). Plaintiff's answer to this proffer of information, was the institution of suit, claiming, *on information and belief*, the overvaluation of the very assets whose worth, as assessed by independent expert examiners he refused to inquire as to or examine (P9). Surely it cannot, therefore, be claimed, in good faith, that all of the facts concerning the worth of the acquired assets were *peculiarly* within the knowledge of the defendants.

The fact that the affiants, the individuals who had knowledge of the facts within the contemplation of Rule 56(e), were "interested" in no way detracts from the factual and persuasive import of their statments. This factor of interest does not, in and of itself, create an issue of credibility. *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 216-217, 51 S. Ct. 453 (1931); *Kuykendall* v. *United Gas Pipe Line Co.*, 208 F. 2d 921, 923, 924 (5 Cir., 1953); *Dewey* v. *Clark*, 86 U. S. App. D. C. 216, 180 F. 2d 766, 770 (D. C. Cir., 1950); *Surkin* v. *Charteris*, 197 F. 2d 77 (5 Cir., 1952); *Compania de Remorque y Salvamento* v. *Esperance, Inc.*, 187 F. 2d 114 (2 Cir., 1951).

3. The decision in the instant case is in conflict with other decisions by different panels of judges in the same Circuit. It has long been recognized that a fundamental divergence of opinion exists among various panels in the Second Circuit Court of Appeals with respect to the applica-

tion, interpretation and utilization of Rule 56. See: ASBILL & SNELL, *Judgment Under the Federal Rules—When an Issue of Fact Is Presented*, 51 Mich. L. Rev. 1143, 1151-1152 (1953), 5 Vand. L. Rev. 607, 611-612 (1952); 6 MOORE, *op. cit.* ¶ 56.15(1), at page 2106, *et seq.*

A decision by the Second Circuit is not so much a determination based upon the principle of *stare decisis* as upon the constituency of the panel composing the Court at a particular moment. There coexists in the Second Circuit, side by side, two diametrically opposed philosophies, decisions, and rules of law; neither view recognizing, attempting to distinguish, explain, or overruling the other. Compare *Arnstein* v. *Porter*, 154 F. 2d 464, 470-471 (2 Cir., 1946); *Colby* v. *Klune*, 178 F. 2d 872, 873, 874 (2 Cir., 1949); *Fogelson* v. *American Woolen Co.*, 170 F. 2d 660 (2 Cir., 1948) with, *Engl* v. *Aetna Life Insurance Co.*, 139 F. 2d 469, 472 (2 Cir., 1943); *Dyer* v. *MacDougall*, 201 F. 2d 265, 268, 269 (2 Cir., 1952); *Radio City Music Hall* v. *United States*, 135 F. 2d 715, 718 (2 Cir., 1943); *Compania De Remorque y Salvamento* v. *Esperance, Inc.*, 187 F. 2d 114, 117 (2 Cir., 1951).

Little need be said with respect to the intolerable and confused state of limbo in which both the practicing Bar and the District Courts of the busiest Circuit of the nation are thrown. We respectfully submit that this intracircuit confusion and "panel warfare" should be resolved by this Court.

4. The intent and meaning of Rule 56 is in a state of confusion by virtue of the decision in the instant case. The issue herein involved concerns many individuals and proceedings now pending and a substantial amount of future litigation in the District Courts. By the decision herein, a certain panel of the Second Circuit Court of Appeals has effectively sterilized the utilization and salutory purpose of Rule 56; and, except possibly in the case where the issues can be resolved by documentary evidence, the Court has

equated the function of Rule 56 to that of Rule 12. It is clear that though Count V of the Amended Complaint may possibly state a claim for relief under Rule 8(a) and thus not be subject to dismissal under Rule 12; when a motion for summary judgment under Rule 56 is made, the mere statement of a claim does not determine the motion. *Lindsey* v. *Leavy*, 149 F. 2d 899 (9 Cir., 1945), *cert. den.* 326 U. S. 783, 66 S. Ct. 331 (1946); *William J. Kelly Co.* v. *Reconstruction Finance Corporation*, 172 F. 2d 865 (1 Cir., 1949).

The plaintiff cannot claim an issue as to a material fact merely by virtue of a verified Complaint, upon information and belief, simply because he is convinced the affiants are telling untruths under oath. Surely the plaintiff should be armed with some facts before he charges reputable businessmen with fraud, waste and mismanagement. For example, upon what does the plaintiff base his claim that certain machinery to be acquired from Diamond was in excess of its true worth—surely not upon the independent expert appraisals plaintiff refused to examine.

5. The vice of the decision below is to allow the plaintiff to run a course contrary to the public policy as established in both the Federal and State jurisdictions. The underlying philosophy incidental to the promulgation of such statutory provisions as Section 61-b, New York General Corporation Law (security for costs), and Rule 23(b), F.R.C.P., is to protect the corporation from litigation based upon unsubstantiated, vague accusations of wrong by a dissident minority. To allow a minority shareholder, who fails to challenge the defendants' affirmative controversion of fraud, waste and mismanagement to proceed to trial upon a perfunctory formalized allegation of fraud, unsupported by a scintilla of evidence, is contrary to established public policy. See *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221 (1949); *Shielcrawt* v. *Moffett*, 294 N. Y. 180, 62 N. E. 2d 392 (1945). It was in recognition of these principles that the New York Supreme Court, Appellate Division, First Department established Trial Term Rule

XI, subd. 6, which requires that the plaintiff-shareholder in a derivated stockholders' suit affirmatively show "special circumstances" before being allowed even to examine the defendants before trial.

6. **Summary:** The issues herein presented are of immediate and continuing importance to the proper disposition of a substantial amount of pending and future litigation in the District Courts. There is confusion and a clear split of authority exists between the decisions of the Tenth Circuit and Third Circuit Courts of Appeals and the holding in the instant case, e.g. *Brooks* v. *Utah Power & Light Co.*, 151 F. 2d 514 (10 Cir., 1945). An irreconcilable intracircuit split prevails in the Second Circuit Court of Appeals preventing the application of any consistent rule of law in a summary judgment situation. These issues can only be resolved by a clear determination and definitive ruling by this Court.

CONCLUSION

For the foregoing reasons this cross-petition for certiorari should be granted.

Respectfully submitted,

SAMUEL M. CHAPIN,
ALVIN MCKINLEY SYLVESTER,
SAMUEL GOTTLIEB,
Counsel for Cross-Petitioners,
Julius Kayser & Co., et als.

Dated: August 26, 1955.

APPENDIX

Excerpts from Federal Rules of Civil Procedure

"RULE 56. SUMMARY JUDGMENT

* * *

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

* * *

"(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
* * *

* * *